BANDAR TANMING SDN BHD v. PENTADBIR TANAH DAERAH KUALA LANGAT & ORS

HIGH COURT MALAYA, SHAH ALAM
AMELIA TEE ABDULLAH J
[CIVIL SUIT NO: BA-22NCVC-187-03-2016]
29 AUGUST 2018

LAND LAW: *Acquisition of land – Compulsory acquisition – Land compulsorily acquired for canal project – Land owner awarded compensation – Discovery that canal project cancelled and land sold to third parties – Decision not communicated to land owner – Whether decision to not use acquired land for intended project amounted to fraud – Whether there was fraud by acquiring authority – Whether land owner had necessary locus standi to initiate action – Whether land owner had cause of action – Whether res judicata applied – Land Acquisition Act 1960, ss. 3(1)(a), 68 & 68A*

CIVIL PROCEDURE: *Striking out – Writ and statement of claim – Land acquisition – Land owner initiated action against acquiring authority – Discovery that canal project cancelled and land sold to third parties – Decision not communicated to land owner – Whether decision to not use acquired land for intended project amounted to fraud – Whether writ and statement of claim disclosed cause of action – Whether fraud pleaded – Whether ought to be struck out – Rules of Court 2012, O. 18 r. 19*

The first and second defendants compulsorily acquired the plaintiff's land ('the subject land'), under s. 3(1)(a) of the Land Acquisition Act 1960 ('the Act'), for a canal project ('the project'). The plaintiff was awarded a compensation sum of RM42,550,711.78 and accepted the same under protest. The plaintiff then filed Form N under s. 38(1) of the Act to refer the matter to the High Court on the grounds that (i) RM4.83 psf was too low and did not reflect the true value of the subject land; (ii) compensation was not given for injurious affection; and (iii) no compensation was given for expenses already incurred by the plaintiff in preparing the development plans, the cost of building the employees' quarters and cost of moving the equipment and employees. The High Court ordered additional compensation to be paid to the plaintiff in the sum of RM10,299,605.40 with interest. However, in 2014, the plaintiff learned that the project had been cancelled in 2010 and the subject land was sold to third parties. This was never communicated to the plaintiff by the defendants. The plaintiff commenced the present claim against the defendants for, *inter alia*, (i) breach of obligations when they cancelled the project; and (ii) acquisition of the subject land through fraud and *mala fide*. The defendants applied to strike out the plaintiff's writ and statement of claim, pursuant to O. 18 r. 19 of the Rules of Court 2012, on the grounds (i) the plaintiff had no *locus* to initiate the present claim as the land acquisition process had long been settled and the

A plaintiff was adequately compensated; (ii) the plaintiff had no cause of action against the defendants; (iii) *res judicata* applied; and (iv) ss. 68 and 68A of the Act applied.

Held (striking out plaintiff's claim):

B **(1)** Form K was served on the plaintiff in 2006, informing that an area of 81.7429 hectares was officially acquired by the first and second defendants. Once Form K had been issued, it signalled the completion of the acquisition process. As at the date of the issuance of Form K, the ownership of the land by the plaintiff had been terminated. Therefore, the plaintiff had no *locus* to commence this suit against the defendants as C the plaintiff's ownership of the subject land had been terminated since 2006. (paras 50 & 51)

(2) Whilst on the face of the statement of claim the plaintiff pleaded fraud, the essence of the pleadings was merely that the defendants had not used D the lands for the purpose of the compulsory acquisition but instead used the same as a vehicle to obtain the subject land at a lower price. The pleadings could not be seen as particulars of fraud. There were no facts pleaded which would allow this case to fall within the exception where the declaration under s. 8 of the Act could be treated as a nullity. The E plaintiff's failure to plead the particulars of fraud amounted to a fatal defect. (paras 55, 56 & 59)

(3) After the protest on the amount of compensation awarded for the acquired land, the issue about the amount of compensation had been put to rest with the consent award reached between the parties. The F compensation had also been paid and the plaintiff received more than RM60 million for the acquired land. The plaintiff was estopped from raising the issue about the amount of compensation that should be paid for the subject land. Some 11 years after the acquisition of the subject land in 2005, it was way too late for the plaintiff to file this action in G 2016. (paras 61 & 64)

(4) This action was an attempt to efface the acquisition proceedings and also the award as the award was an essential and integral part of the acquisition proceedings. The intention of Parliament in amending the Act, by including the new s. 68A, was to ensure that any acquisition of H land would not be challenged in any court by reason of the subsequent disposal, use or dealing with the acquired land after the acquisition. With s. 68A, the plaintiff would not be able to challenge the subsequent sale of the acquired land *albeit* at a higher price. There is no provision in the Act which mandates the acquiring authority to offer back the land I to the original owner if the acquired land is subsequently not required for the purpose for which it was acquired. (paras 66-68)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor [2014] 7 CLJ 882 CA ***(refd)***

Lee Kim Luang v. Lee Shiah Yee [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 HC ***(refd)***

Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***

See Hua Daily News Bhd v. Tan Thien Chin & Ors [1985] 1 LNS 131 SC ***(refd)***

Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***

Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd [1975] AC 581 ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 3(1)(a), 8, 10, 11, 16, 38(1), 68, 68A

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 92 r. 4

For the plaintiff - Wan Aizuddin Wan Mohammed; M/s Shafee & Co

For the 1st, 2nd and 4th defendants - Naziah Mokhtar; State Legal Advisors, Selangor

For the 3rd defendant - Masturina Mohamed Rodzi; M/s Edwin Lim & Suren

Reported by Najib Tamby

JUDGMENT

(encls. 27 & 31)

Amelia Tee Abdullah J:

[1] The plaintiff, Bandar Tanming Sdn Bhd, claims against the defendants, the Pentadbir Tanah Daerah Kuala Langat ("the first defendant"), the Pengarah Tanah dan Galian Selangor ("the second defendant"), Menteri Besar Selangor Incorporated ("the third defendant") and the Kerajaan Negeri Selangor ("the fourth defendant") for declaratory and other reliefs, general, aggravated and punitive damages, interests and costs.

[2] The first defendant, the Pentadbir Tanah Daerah Kuala Langat, is the Land Administrator for the District of Kuala Langat. The second defendant, the Pengarah Tanah dan Galian Selangor, is the Director of the Selangor Lands and Mines Office. The third defendant, Menteri Besar Selangor Incorporated, is a body corporate established under Enactment No. 3, 1994 of Selangor. The fourth defendant, Kerajaan Negeri Selangor, is the State Government of Selangor. The plaintiff's claims are disputed by the defendants who, in invoking s. 68A of the Land Acquisition Act 1960, contend that the plaintiff has no *locus standi* to commence this action against them. The defendants had also raised issues of 'laches', *res judicata* and limitation.

A **Brief Background Facts**

[3] Some brief background facts are in order before proceeding to the two applications before the court. These background facts are gleaned primarily from the statement of claim.

B **[4]** The plaintiff previously owned a total area of land measuring 181.2000 hectares (equivalent to 447.7550 acres) held under Master Title No. P.N.11424, Lot 12287, Mukim Tanjung Dua Belas, Daerah Kuala Langat (hereinafter referred to as "the said land"). A portion of the said land measuring 81.7429 hectares (equivalent to 201.9911 acres) (hereinafter C referred to as "the subject land") was compulsorily acquired from the plaintiff by the defendants for a projek terusan air aka canal city project.

[5] Currently, the subject land has been subdivided into two lots, namely:

(i) Lot PT 33010 with Grant No. H.S.(D) 30645 registered on 10 November 2011 with ownership vesting in the third defendant. There D is a private caveat lodged by Sapphire Index Sdn Bhd on this land;

(ii) Lot PT 33011 with Grant No. H.S. (D) 30656 also registered on 10 November 2011 with ownership vesting in a company named Radiant Pillar Sdn Bhd.

E **[6]** On 19 November 2014, Lot PT 33010 had been further subdivided into four plots of land as follows:

(i) Lot PT 41339 bearing Grant No. H.S. (D) 39275. There is a private caveat lodged by Sapphire Index Sdn Bhd;

F (ii) Lot PT 41338 bearing Grant No. H.S. (D) 39274. There is also a private caveat lodged by Sapphire Index Sdn Bhd;

(iii) Lot PT 41337 bearing Grant No. H.S. (D) 39273. There is also a private caveat lodged by Sapphire Index Sdn Bhd for this lot; and

G (iv) Lot PT 41336 bearing Grant No. H.S. (D) 39272. There is also a private caveat lodged by Sapphire Index Sdn Bhd for this lot.

[7] On or about 12 May 2005, the first and second defendants had compulsorily acquired six lots of land, including the subject land, under s. 3(1)(a) of the Land Acquisition Act 1960. The acquisition was published H in the *Selangor State Government Gazette* dated 12 May 2005. The purpose of the compulsory acquisition as stated in the *Gazette* as follows:

> Permohonan Pengambilan Tanah di bawah seksyen 3(1)(a) Akta Pengambilan Tanah 1960 sebanyak 6 Lot bagi Projek Terusan Air untuk tujuan Tebatan Banjir di antara Sungai Langat dan Sungai Klang.

I **[8]** On 9 August 2006, Forms E and F under ss. 10 and 11 of the Land Acquisition Act 1960 were served on the plaintiff to inform about the hearing that would be held on 13 September 2006 for the purpose of the compulsory acquisition. However, on 8 September 2006 a certificate of urgency in

Form I was served on the plaintiff to inform that the subject land was to be compulsorily acquired immediately. Subsequently, Form K dated 13 September 2006 was served on the plaintiff by the first defendant informing that an area of 81.7429 hectares, equivalent to 201.9911 acres, from the total of 181.2000 hectares, equivalent to 447.7550 acres, was officially acquired by the first and second defendants.

[9] Form H dated 29 September 2006 under s. 16 of the said Act was served on the plaintiff indicating that the amount of compensation for the compulsory acquisition of the subject land was RM42,506,308.00 (RM4.83 per s feet) and an additional RM44,403.78 as valuation fees, thus making the total amount of compensation as RM42,550,711.78. The plaintiff accepted the award under protest.

[10] The plaintiff filed Form N under s. 38(1) of the said Act to refer the matter to the High Court. The plaintiff's reasons for the objection are stated to be as follows:

(i) the amount of compensation at RM4.83 psf was too low and did not reflect the true value of the subject land which had a high potential to be developed based on location, accessibility, size and the condition of the land. The Land Administrator did not take into account the transfer value of surrounding lands with similar traits as the subject land which were sold at between RM9.50 to RM14.40 psf;

(ii) Compensation was not given for injurious affection. As a result of the compulsory acquisition, the remaining land lost its access from Jalan Kampong Lombong and Jalan Jurutera. These roads connected the subject land to the trunk roads which gives access to major highways such as Lebuhraya Damansara Puchong and Lebuhraya Kesas. The compulsory acquisition affected the value of the remaining lands by at least 50%; and

(iii) No compensation was given for expenses already incurred by the plaintiff in preparing the development plans, the cost of building the employees' quarters and cost of moving the equipment and employees.

[11] On 28 July 2011, at the land reference hearing, the High Court ordered additional compensation to be paid to the plaintiff in the sum of RM10,299,605.40, interest of 8% per annum from Form K dated 13 September 2006 on the amount of the additional compensation until full and final settlement and cost of valuation in the sum of RM19,668 with the additional compensation, the final compensation amount was RM6 psf.

[12] After the 12th General Elections, the fourth defendant came under the control of the Pakatan Rakyat Coalition and Tan Sri Khalid bin Ibrahim became the Menteri Besar and the chief administrator of the other defendants.

[13] In late 2014, the plaintiff discovered that the canal city project had been cancelled in 2010 and the subject land sold to third parties. The cancellation of the project and the transfer of the subject land were never communicated to the plaintiff by any of the defendants.

[14] Feeling aggrieved, the plaintiff sent a letter dated 29 January 2015 to the Menteri Besar of the fourth defendant, YAB Datuk Seri Mohamed Azmin bin Ali, stating *inter alia* that the plaintiff was never given an opportunity to buy back the land which was compulsorily acquired by the defendants in 2006 but that instead the subject land was sold to third-party purchasers without the plaintiff being informed. It was also stated that the current value of surrounding lands to the subject land was at least RM35 psf.

[15] As such, the plaintiff's various causes of action are stated as breach of statutory duty, doctrine of legitimate expectations, misfeasance in public office/ breach of their fiduciary duties/ breach of trust, unjust enrichment, fraudulent and *mala fide* acquisition of the subject land.

[16] The above account is necessary for a better understanding of the two applications made by the defendants for the determination of the court.

Enclosure 27

[17] There are two applications for striking out under O. 18 r. 19 of the Rules of Court 2012 ("ROC") before the court. Enclosure 27 is the application of the third defendant to strike out the plaintiff's writ and statement of claim against the third defendant under O. 18 r. 19(1)(a) or (b) and/ or (c) and/or (d) of the RHC or the inherent powers of the court under O. 92 r. 4.

The Third Defendant's Affidavit in Support

[18] The third defendant's application is supported by the affidavit-in-support (encl. 28) of Raja Shahreen bin Raja Othman, the chief executive officer of the third defendant.

[19] With reference to the plaintiff's claim as set out in its statement of claim, the deponent pointed out that:

(i) Form H which had been issued and served on the plaintiff in accordance with s. 16 of the Land Acquisition Act 1960 had recorded the compensation at RM42,506,308 (RM4.83 psf) and an additional RM44,403.78 for the valuation fee, thus making a total award of RM42,550,711.78;

(ii) The plaintiff had challenged the award on the ground that the compensation was too low. On 28 July 2011, the High Court had ordered *inter alia* the first and second defendants to pay additional compensation of RM10.299.605.40 (thus making the compensation to be RM6 psf);

(iii) The plaintiff has received in total a sum of RM60,064,695.60;

(iv) The plaintiff's current claim is based on the fact that the 'projek terusan air' had been cancelled and the land that was compulsorily acquired had been sold to a third party;

(v) The plaintiff's complaint is that it was not informed about the cancellation of the project or given an opportunity to buy back the land which had been compulsorily acquired. At present, the value of the land had risen to about RM35 psf.

[20] The plaintiff had thus filed its claim on the basis of the defendants' alleged breach of its obligations when they cancelled the 'projek terusan air', the plaintiff's legitimate expectations to be given an opportunity to buy back the subject land, misfeasance on the part of the defendants in failing to offer to the plaintiff an opportunity to buy back the subject land, unjust enrichment through the sale of the subject land which was compulsorily acquired, and acquisition of the subject land through fraud and *mala fide*.

[21] The deponent avers that the plaintiff has no cause of action against the third defendant because the third defendant, at all material times, was never involved in the acquisition of the plaintiff's land. As such, the plaintiff's claim against the third defendant for fraud in the compulsory acquisition of the plaintiff's land was without basis.

[22] Similarly, the deponent avers that the plaintiff's allegations against the third defendant with respect to its failure to carry out the responsibilities and obligations of a public servant are without basis as the third defendant is not a public servant.

[23] The deponent also avers that the plaintiff's statement of claim does not disclose any particulars of fraud against the third defendant. The failure to plead particulars of fraud would render the plaintiff's claim against the third defendant to be scandalous, frivolous and vexatious.

[24] The deponent has relied on the s. 68A of the Land Acquisition Act 1960 which states that where land has been acquired under the Act, no subsequent disposal of, or dealing with, the land shall invalidate the acquisition of the land.

[25] In the circumstances, the deponent avers that the plaintiff's statement of claim discloses no reasonable cause of action against the third defendant, that the plaintiff's claim is scandalous, frivolous or vexatious or is an abuse of the process of court and should be struck off with costs.

The Plaintiff's Affidavit-In-Reply

[26] The plaintiff's affidavit in reply is affirmed by Tan Pau Son, a director of the plaintiff. The deponent disputes the averments of the third defendant and states his belief that the plaintiff's action is sustainable.

[27] The deponent avers that the cancellation of the projek terusan air was never informed to the plaintiff by any of the defendants and the plaintiff was never given a chance to buy back the subject land which was compulsorily acquired from the plaintiff after the project was cancelled.

[28] The plaintiff disputes that the third defendant was never involved in the acquisition of the plaintiff's land. The deponent pointed out that the subject land was divided into two lots. After the land acquisition, Lot PT 33010 was vested in the name of the third defendant and a private caveat was entered over the said lot by Sapphire Index Sdn Bhd on 23 April 2013.

[29] On 19 November 2014, Lot PT 33010 was sub-divided into four parts, namely Lot PT 41339 grant No. H.S. (D) 39275, Lot PT 41338 grant No. H.S. (D) 39274, Lot PT 41337 grant No. H.S. (D) 39273 and Lot PT 41336 grant No. H.S. (D) 39272. Caveats were lodged over all these four lots by Sapphire Index Sdn Bhd. According to the deponent, the fact that these caveats were lodged brought an irresistible inference that there were dealings in respect of the lots between the third defendant and Sapphire Index Sdn Bhd.

[30] The deponent further avers that the Menteri Besar had stated in the first meeting of the 13th Selangor State Assembly that the issue of the sale of the land for the canal city project was between Menteri Besar Incorporated (the third defendant), PNSB and Dijaya Corporation Sdn Bhd. The Menteri Besar had gone on to say that in April 2013, a sale and purchase cum development agreement was signed between Menteri Besar Incorporated and PNSB and Sapphire Index, a subsidiary of Tropicana. This would clearly show the involvement of the third defendant with the subject matter of the suit. And on 6 April 2015, the Menteri Besar of the fourth defendant had again stated about the involvement of the third defendant in the acquisition of the lands for the canal city project.

[31] The deponent had also referred to the 13th Selangor State Assembly (Penggal Ketiga) where the Menteri Besar had stated that the State Government through the Menteri Besar Incorporated (the third defendant) had on 15 April 2013 signed a sale and purchase cum development agreement with Sapphire Index Sdn Bhd which was 100% owned by Tropicana Bhd which involved 1172 acres of land in the Mukim of Kuala Langat at a price of RM18.50 psf.

[32] The deponent also avers that s. 68A of the Land Acquisition Act 1960 has no application in this case because the defendants will not be protected under the law where the land acquisition process is carried out with fraud and *mala fide* on the part of the defendants.

Enclosure 31

[33] Enclosure 31 is the application of the first, second and fourth defendants to strike out the plaintiff's writ and statement of claim against them under O. 18 r. 19(1)(a) or (b) and/ or (c) and/ or (d) of the RHC or the inherent powers of the court under O. 92.

The Affidavit In Support Of The First, Second And Fourth Defendants

[34] The first, second and fourth defendants' application is supported by the affidavit-in-support (encl. 32) of Nor Afida binti Zahazmi, the Penolong Pegawai Daerah Kuala Langat. The contents of this affidavit-in-support are almost identical to the affidavit-in-support of the third defendant in encl. 28. The deponent in encl. 32 pleads a lack of *locus standi* on the part of the plaintiff in pursuing this action against them on the basis that the land acquisition has long been over and the plaintiff had been adequately compensated. The deponent avers that as soon as the process of compulsory acquisition of the subject land was completed and the entire compensation amount was paid, the plaintiff would have no *locus standi* to commence this proceeding against the first, second and fourth defendants. As such, it is contended that the plaintiff has no reasonable cause of action against the defendants.

[35] The deponent also avers that the plaintiff's statement of claim failed to disclose any details or particulars of material facts pertaining to the allegations of fraud levelled against the first, second and fourth defendants in the compulsory acquisition of the subject land. Where the plaintiff alleges fraud, the burden falls on the plaintiff to particularise the particulars of fraud, and this has not been done.

[36] Similarly as in the third defendant's affidavit-in-support (encl. 28), the first, second and fourth defendants also relied on the s. 68A of the Land Acquisition Act 1960 in arguing that the plaintiff had no cause of action against them. Section 68A of the Act provides that where land has been acquired under the Act, no subsequent disposal of, or dealing with, the land shall invalidate the acquisition of the land.

The Plaintiff's Affidavit-In-Reply (Encl. 33)

[37] The plaintiff's affidavit-in-reply to oppose the application of the first, second and fourth defendants is also affirmed by Tan Pau Son.

[38] According to the deponent, the plaintiff took the position that its action brought against the defendants has merit and ought to be fully ventilated and dealt with at trial.

[39] The deponent denies the defendants' claim that it had no *locus standi* to commence the suit against them. It contends that although the acquisition "was allegedly concluded and compensation paid", however his allegation is that the acquisition was done "*in lieu* of fraud" and thus it maintains that it had *locus* to sustain the action.

[40] The deponent further avers that the defendants had acted in breach of their statutory duty and thus had "acted wrongly in law and/or *ultra vires* when the subject lands were acquired but not put to its intended use of a flood mitigation project.

[41] Furthermore, it was averred that the defendants had misused their powers when, having cancelled the project, they did not attempt to provide the plaintiff with a right of first refusal to repurchase the subject lands. It was contended that this was contrary to the principles of equity, fairness and the doctrine of legitimate expectations and that these issues ought to be tried before the court.

[42] The deponent disputes paras. 9-11 of the defendants' affidavit and states that the plaintiff's statement of claim (para. 37) reveals particulars and material facts regarding the plaintiff's action of fraud which includes the following details as pleaded:

(i) upon publishing the intention to acquire the subject land in the *State Gazette* dated 12 May 2005, the defendants had fraudulently represented to the plaintiff that the purpose of the compulsory acquisition was for the flood mitigation project;

(ii) a substantial portion of the six lots stated in the *Gazette* was not part of the actual canal or corridor of the canal;

(iii) the real intention of the defendants was to conduct a commercial project and not to proceed with the canal for flood mitigation;

(iv) the defendants merely used the compulsory acquisition to obtain the subject land at a lower cost in order for the defendants to obtain super profits;

(v) the third and fourth defendants knew, prior to the compulsory acquisition, that the flood mitigation project had slim chances of being successful;

(vi) the plaintiff relied on the representations of the defendants and did not question the gazetted purpose at that time. It was only after the subject lands had been sold to third parties that the plaintiff realised that the compulsory acquisition was conducted fraudulently;

(vii) the defendants had transferred the land to a third party purchaser prior to making full and final payment of the award.

[43] As for encl. 27, the deponent also avers that s. 68A of the Land Acquisition Act 1960 has no application in this case because the defendants will not be protected under the law where the land acquisition process is carried out with fraud and *mala fide* on the part of the defendants. Further to this, the deponent states that s. 68A would need to be considered together with other causes of action as pleaded by the plaintiff such as breach of statutory duty, legitimate expectation, *mala fide*, misfeasance in public office

and unjust enrichment. In any event, the deponent states that the averment of the defendants as regards s. 68A of the Land Acquisition Act 1960 is a point of law which needs to be considered by the court at trial.

The Law

[44] According to encls. 27 and 31, the second defendant's applications for striking out are made pursuant to O. 18 r. 19(1)(a) or (b) and/or (c) and/or (d) of the Rules of Court 2012 and the inherent jurisdiction of the court. The relevant order of the Rules of Court reads as follows:

> 19. Striking out pleadings and endorsements. (O.18 r.19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; and
>
> (d) it is otherwise an abuse of the process of the Court.

[45] The principles of law in relation to striking out applications are clear. The authority to be followed in such applications is the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 where His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ (as he was then) held as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v L. & N.W. Ry. Co.* [1892] 3 CH. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA) ....
>
> ... It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA); (*Wenlock v. Moloney*) (*supra*).

Findings

[46] In coming to a decision in this case, the court is reminded of the words of Lord Diplock in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133; [1975] 2 MLJ 1 that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should be exercised with the utmost of caution. And in the words of the Supreme Court in *Bandar Builders* (*supra*), it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 which should only be adopted when it can be clearly seen that a claim is on the face of it "obviously unsustainable". So long as the proceedings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

[47] In this case, the defendants are relying on the various grounds for their applications. The court will now deal with these grounds as well as various other issues that were raised by the defendants, as follows:

(i) the issue of *locus* for the plaintiff to initiate the suit;

(ii) whether the plaintiff has a cause of action against the defendants;

(iii) *res judicata*; and

(iv) the applicability of ss. 68 and 68A of the Land Acquisition Act 1960.

Locus

[48] On the issue of *locus*, the court notes the defendants' submissions that the land acquisition process had long been settled and the plaintiff had been adequately compensated. Reference was made to the case of *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 where Salleh Abas LP had held as follows:

> Refusal to grant the injunction in this case is also consistent with paragraphs (d) and (k) of section 54 of the Specific Relief Act in that no injunction can be granted 'to interfere with the public duties of any department of any Government' **nor can it be granted 'where the applicant has no personal interest in the matter'. Personal interest here must surely mean legal interest and not merely political interest.** (emphasis added)

[49] The defendants have also directed the attention of the court to the Court of Appeal case of *Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor* [2014] 7 CLJ 882 where Mah Weng Kwai JCA had stated as follows:

> Likewise in this case, once Borang K had been issued giving notice that possession had been formally taken of the land under section 22 of the Act **it signalled the completion of the acquisition process** and that the ownership of the land by the proprietor at the material time **had been terminated**. (emphasis added)

[50] The court notes from the summary of facts that Form K dated 13 September 2006 was served on the plaintiff by the first defendant informing that an area of 81.7429 hectares (equivalent to 201.9911 acres) from the total of 181.2000 hectares (equivalent to 447.7550 acres) was officially acquired by the first and second defendants. Thus, in line with and following the decision of the Court of Appeal in *Ishmael Lim Abdullah* (*supra*), the court agrees with learned counsel for the defendants that once borang K has been issued to the plaintiff in 2006, "it signalled the completion of the acquisition process". The court agrees that as at the date of the issuance of Borang K, the ownership of the land by the plaintiff had been terminated.

[51] That being the case, the court finds that in 2016, the plaintiff had no *locus* to commence this suit against the defendants as the plaintiff's ownership of the subject land had been terminated since 2006.

Cause Of Action

[52] The first, second and fourth defendants submit that the plaintiff's statement of claim had failed to disclose any material facts relating to fraud committed by the said defendants in relation to the compulsory acquisition of the said land. Since the plaintiff had pleaded fraud as a cause of action, the burden falls on the plaintiff to particularise the particulars of fraud, which the defendants submit the plaintiff had failed to do.

[53] In response to this issue, the plaintiff submits that they had particularised the fraud that was committed in the statement of claim. The court has carefully perused para. 37 of the statement of claim where the plaintiff has pleaded that the compulsory acquisition of the subject land was undertaken fraudulently. In summary, what the plaintiff has pleaded is that whilst the avowed reason for the acquisition was for the "projek terusan air untuk tebatan banjir di antara Sungai Langat dan Sungai Klang", the real intention of the third and fourth defendants was to conduct a commercial project on the subject land in order to obtain "super profits". The question that arises is whether para. 37 would amount to sufficient particularisation of the fraud allegedly committed.

[54] The plaintiff claims that it had never questioned the gazetted purpose of the subject lands and had only discovered that the compulsory acquisition was conducted fraudulently when it discovered that the subject lands were sold to third parties in late 2014.

[55] The court has carefully considered the parties' differing submissions on this issue. Whilst on the face of the statement of claim, the plaintiff has pleaded fraud, however the essence of the pleadings is merely that the defendants had not used the lands for the purpose of the compulsory acquisition, namely the flood mitigation project, but had instead used the

compulsory acquisition as a vehicle to obtain the subject land at a lower price. The court notes that the only fact pleaded in support of the claim of fraud is that the land area proposed for the canal city project far exceeds the size of the actual area for the canal itself.

[56] The court is unable to see this as pleading the particulars of fraud. It need not be gainsaid that where land is acquired for a particular project such as the canal city project, the amount of land acquired would necessarily need to be in excess of the actual size of the canal. Similarly, the revelations in the State Assembly as to the non-feasibility of the flood mitigation project do not tantamount to particulars of fraud. The court is of the considered view that more is required to plead fraud than just that.

[57] On this issue, learned counsel for the plaintiff has referred to the Court of Appeal case of *Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 CLJ 960 where Ahmad Fairus JCA had stated as follows:

> On this issue, the learned Abdoolcader J (as he was then) when delivering the judgment of the Federal Court in *S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204 said:
>
> > The conclusive evidence clause in s. 8(3) which we have mentioned in effect provides that the decision of the State Authority that the land is needed for the purpose specified under s. 8(1) is final and conclusive and cannot be questioned (*Wijeyesekera v Festing* AIR [1919] PC 155). The Privy Council however held in *Syed Omar Alsagoff & Anor v. Government of the State of Johore* [1979] 1 MLJ 49 (at p. 50) that it may be possible to treat a declaration under s. 8 as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within s. 3 or if bad faith can be established. The purpose of the acquisition can therefore be questioned **but only to this extent**. (emphasis added)

[58] The defendants, on the other hand, have argued that fraud and conspiracy must be specifically pleaded. A general allegation of fraud is insufficient even to amount to an averment of fraud of which any court ought to take note. (See: *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717; [1988] 1 MLJ 193). Further, in the case of *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738, the Court of Appeal had relied on the Supreme Court case of *See Hua Daily News Sdn Bhd v. Tan Thien Chin & Ors* [1985] 1 LNS 131; [1986] 2 MLJ 107 which held that the failure to condescend upon particulars of fraud was fatal.

[59] After carefully perusing the plaintiff's statement of claim, the court is of the considered view that there are no facts pleaded which would allow this case to fall within the exception where the declaration under s. 8 can be treated as a nullity. In the circumstances of this case, the court finds that the case of *S Kulasingam & Anor* has no application here for the plaintiff to

question the purpose of the acquisition. In the circumstances, the court is inclined to find that the plaintiff's failure to plead the particulars of fraud amounted to a fatal defect.

Res Judicata

[60] The third defendant has raised *res judicata* as an issue and submits that the plaintiff should be estopped from bringing this suit against the defendants. The court notes that the plaintiff's various causes of action all stem from the compulsory acquisition of the subject lands. It is true that the amount of compensation awarded to the plaintiff had been argued and decided by the court on 28 July 2011 and a consent order was entered into between the parties on 29 March 2013 pertaining to the additional compensation that was to be paid to the plaintiff. It is also not disputed that the plaintiff has already received a sum of RM60,064,695.60 as compensation for the acquired land. The defendants' complaint is that after the plaintiff had received and enjoyed this compensation, which they could only do if the acquisition was valid, the plaintiff now wished to recover the acquired land on the basis that the acquisition was void. And this, says the defendants, amounts to approbating and reprobating, which the plaintiff is not permitted to do.

[61] The court finds that after the protest as regards the amount of compensation awarded for the acquired land, the issue about the amount of compensation has been put to rest with the consent award that was reached between the parties. The compensation has also been paid and the plaintiff has received more than RM60 million for the acquired land. The court finds that this is an issue which cannot be raised again by the plaintiff.

[62] What then is the plaintiff's unhappiness here? In a nutshell, it is that after they had not raised any protest as to the purpose of the acquisition, namely for the canal city project, they had discovered that the subject lands had been sold to third-party purchasers in late 2014. It is based on this that the plaintiff says that the compulsory acquisition was conducted fraudulently.

[63] In response to this issue, the third defendant reminded the court that the purpose behind the principles of *res judicata* and issue estoppel is to bring finality and certainty to litigation without having the matter reagitated repeatedly. In the Privy Council case of *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581, Lord Kilbrandon stated as follows:

> ... it becomes an abuse of process to raise in subsequent proceedings matters that could and therefore should be litigated in earlier proceedings.

[64] This court agrees that in this case, the issue regarding the amount of compensation that should be awarded to the plaintiff for the subject land has already been argued and decided by the court. An order had been made by the court on 28 July 2011 and a consent order entered between the parties on 29 March 2013 pertaining to the additional compensation to be paid to

the plaintiff. In this sense, the court agrees with the defendants that the plaintiff is estopped from raising the issue about the amount of compensation that should be paid for the subject lands. The court is of the considered view that some 11 years after the acquisition of the subject land in 2005, it is way too late for the plaintiff to file this present action in 2016.

Sections 68 And 68A

[65] The defendants have raised the issue of s. 68 and 68A of the Land Acquisition Act 1960 in their argument that the plaintiff is barred from initiating or continuing with this action against the defendants. Sections 68 and 68A of the said Act read as follows:

> 68. Bar to setting aside of awards
>
> No suit shall be brought to set aside an award or apportionment under this Act.
>
> 68A. Subsequent disposal, etc.,of acquired land not to invalidate acquisition
>
> Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land.

[66] The court notes the third defendant's submission that s. 68 of the Act bars the plaintiff from initiating or continuing with this application. The court agrees that this action is an attempt to efface the acquisition proceedings and also the award as the award is an essential and integral part of the acquisition proceedings.

[67] Further, upon a careful study of s. 68A, the court agrees with the defendants that the intention of Parliament in amending the Act by including the new s. 68A was to ensure that any acquisition of land will not be challenged in any court by reason of the subsequent disposal or use or dealings with the acquired land after the acquisition. With this amendment, all authorities prior to the amendment and introduction of the new s. 68A would no longer constitute good law.

[68] The court is of the view that with s. 68A, the plaintiff would not be able to challenge the subsequent sale of the acquired land *albeit* at a higher price. The court further notes that there is no provision in the Land Acquisition Act 1960 which mandates the acquiring authority to offer back the land to the original owner if the acquired land is subsequently not required for the purpose for which it was acquired.

Conclusion

[69] In conclusion, the court finds for the reasons aforestated that the defendants have succeeded in establishing that the plaintiff's case is on the face of it obviously unsustainable. This is a case where recourse can and should be had to the summary procedure under O. 18 r. 19 of the Rules of Court 2012. In the circumstances, the court had allowed the defendants' applications in encls. 27 and 31 and ordered that the plaintiff's statement of claim against the first, second and fourth defendants as well as that against the third defendant be struck off with costs of RM8,000 each.